No. 76-752

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES PAROLE COMMISSION, APPELLANT

v.

LYMAN T. SHEPARD

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE APPELLANT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Appellee does not take issue with our argument that the court of appeals' decision in this case is inconsistent with *Moody* v. *Daggett*, No. 74-6632, decided November 15, 1976. Rather, he makes several arguments designed to avoid the consequences of that inconsistency. We respond below to these arguments.

1. Appellee contends (Mot. to Dismiss 5) that this case is moot because he has been paroled from his state sentence. It is not moot. The court of appeals remanded this case to the district court with instructions to conduct a hearing to determine whether the Parole Commission's delay in holding appropriate proceedings prejudiced appellee; if the district court finds prejudice, it is to quash the parole violator warrant (J.S. App. 19a). The effect of such a decision would be that the Commission may not revoke appellee's parole because of the intervening New York crime of second degree

robbery. That controversy—whether the Commission has forfeited its right to revoke appellee's parole—is live, and whether appellee remains in state custody is irrelevant to its disposition.

In our view this case would become moot only if the Parole Commission were to decide not to revoke appellee's parole despite his intervening state crime. See *Weinstein* v. *Bradford*, 423 U.S. 147; *Preiser* v. *Newkirk*, 422 U.S. 395. If appellee were released, the controversy concerning the propriety of his continued confinement because of his intervening state crime would come to an end. But appellee has not yet been released from federal custody, and his federal sentence does not expire until July 1978.[1]

2. Appellee argues (Mot. to Dismiss 4-5) that the court of appeals did not hold an Act of Congress unconstitutional but simply ordered the Parole Commission to provide procedures not otherwise required by an Act of Congress. The court of appeals had a different view of its action,

[1]The Parole Commission has scheduled a hearing for January 11, 1977, at which a panel of examiners will take evidence and make a recommendation concerning the revocation of appellee's parole on account of the intervening offense. This recommendation then will be reviewed by the regional office of the Parole Commission. If the Commission should decide not to revoke appellee's parole, this case would become moot. There is no reason, however, for the Court to defer consideration of this case while the Commission makes its decision. If the Commission disposes of this case in a way that makes it moot, we will inform the Court promptly. It then would be appropriate to vacate the judgment of the court of appeals and to remand the case to the district court with instructions to dismiss the complaint (see *Weinstein* v. *Bradford*, *supra*, 423 U.S. at 149), not, as appellee suggests, to dismiss the appeal. On the other hand, if the Court were to defer the decision on probable jurisdiction, the chance of obtaining a decision in this case during the present term would be virtually eliminated unless the Court were to treat the case summarily.

however. It wrote that the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 *et seq.*, amending 18 U.S.C. 4201 *et seq.*, "suffers from constitutional infirmity" (J.S. App. 15a). The court of appeals therefore devised, and required the Parole Commission to follow, procedures that it believed would rectify the "constitutional infirmity" of the statute.[2] This is, therefore, the type of case in which review lies by appeal pursuant to 28 U.S.C. 1252.

3. Appellee suggests (Mot. to Dismiss 5-8) that this case should be remanded for further proceedings to determine whether he was prejudiced because of any delay in holding the hearings the court of appeals believes are required. There is no purpose in such a remand. As we have argued in the jurisdictional statement, this case is governed by *Moody*, and a remand of the sort suggested by appellee would be an exercise in futility. Appendices A and C to appellee's Motion to Dismiss make it clear that appellee never told the Parole Commission that he desired to present mitigating evidence or that important facts might become unavailable during a lapse of time. Even if such a demonstration now were relevant (and, in light of *Moody*, we believe that it would not be), nothing appellee could now establish would excuse his failure to present these claims to the Parole Commission at an earlier date and to offer it an opportunity to evaluate the evidence to determine whether,

[2]The legislative history of the Parole Commission and Reorganization Act indicates that Congress considered and rejected suggestions that the Parole Commission should be required to provide procedures more elaborate than those specified in the Act. See, *e.g.*, S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 35 (1976). Congress was delineating the procedures that it wanted the Parole Commission to follow, not setting minima to which courts could add at their option.

if true, it would be material to decisions concerning appellee's parole.[3]

For these reasons, in addition to the reasons in the jurisdictional statement, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

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[3]Here, as in *Moody*, although appellee makes general claims that evidence may have been lost, he does not say, even in this Court, what this evidence is, why it is no longer available, or why it would affect the Parole Commission's decisions.